**UNITED STATES DISTRICT COURT**
**DISTRICT OF MAINE**

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| **AARON WHITNEY,** | ) | |
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| **Plaintiff** | ) | |
| | ) | |
| **v.** | ) | **Civil No. 96-160-B** |
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| **CITY OF AUGUSTA, WAYNE McCAMISH, AL MORIN, and KEITH BRANN,** | ) | |
| | ) | |
| **Defendants** | ) | |

## MEMORANDUM OF DECISION[1]

The plaintiff, Aaron Whitney, brought this action against the defendants, the City of Augusta, its police chief, Wayne McCamish, and police officers Al Morin and Keith Brann, seeking damages for violations of his constitutional rights pursuant to 42 U.S.C. § 1983[2] and damages for assault pursuant to state tort law. For the reasons set forth below, the Court grants the defendants' motion for summary judgments in part and denies it in part.

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[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

[2] 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## I. Summary Judgment

A summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine, for these purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record in the light most favorable to the nonmovant. *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

## II. Background

Considering the procedural posture of the case, the Court recites the facts in a light most favorable to the plaintiff, Aaron Whitney. This matter arises out of the arrest of Whitney at the Capitol Shopping Center in Augusta on September 17, 1994. Whitney, then aged nineteen, was skateboarding that day in the parking lot adjacent to the Service Merchandise store when police arrived at the scene and, he claims, unlawfully arrested him and subjected him to excessive force that resulted in his left elbow being broken.

Sometime in the afternoon that day, Augusta police were summoned to the shopping center, having received a complaint by an employee of Service Merchandise that a youth was skateboarding without permission in front of the store. Patrol officer Al Morin arrived first at the scene and, having witnessed a youth proceeding into a glass-enclosed walkway of the mall, pursued him. Morin

located the youth, later determined to be Whitney, and asked him if he had any identification. Whitney told Morin that he had none, and was reluctant to divulge his identity and address. Whitney repeatedly attempted to leave the area, but was prevented from doing so by Morin, who used his considerably larger frame to block Whitney's egress. Morin apparently spoke to Whitney about skateboarding in the parking lot and, after Whitney's attempts to depart the scene failed, he eventually was arrested by Morin, who claimed that he had been assaulted by Whitney in violation of 17-A M.R.S.A. § 207 (1983 & Supp. 1996).[3] Morin avers that Whitney thrust his arm into his chest and shoved him backward. Whitney maintains that he did not assault Morin but, rather, was himself knocked backward a few steps after Morin pushed him.

Whitney claims that Morin next clubbed him on the neck, knocked him to the ground, and dragged him by the neck in a choke-hold to the parking lot, where Whitney was slammed face-down onto the hood of a police cruiser. Whitney maintains that as he lay pinned on the hood, Morin pulled on his left arm three times until Whitney's elbow was broken. Whitney was handcuffed behind his back and claims that he deliberately was dragged the long way around the cruiser by Morin and thrown inside. On the drive to the police station, Whitney claims that he was verbally abused by Morin, who called him "Sunshine" and "Sweetheart," apparently in reference to Whitney's physical appearance, which included earrings and dyed blond hair. Whitney contends that another officer present at the scene of his arrest, Keith Brann, also participated in the unlawful arrest and assault.[4]

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[3] 17-A M.R.S.A. § 207(1) (1983 & Supp. 1996) provides in relevant part:

> A person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.

[4] The District Attorney subsequently "filed" the charges against Whitney, a procedure whereby prosecution of a charge is deferred unless another infraction occurs within a certain time

Whitney contends that a review of departmental job performance evaluations and citizen complaints discloses that Morin has a history of being ill-tempered and abrupt in his dealings with the citizenry. The plaintiff also maintains that the City was aware of Morin's poor reputation and job performance, but wrongly allowed him to continue patrolling the community. The City, according to Whitney, failed to adequately train or counsel Morin, and was indifferent to the threat he posed to citizens like himself, all of which led to the result in this case.

## III. Discussion

### *A. Federal claims*

Whitney contends in Count I of his complaint that his arrest was unlawful and that the amount of force used by Morin was excessive. He claims that the defendants' actions violated his Fourth Amendment[5] right to be free from unreasonable seizures and that they should be held liable pursuant to § 1983. The defendants contend that Whitney's arrest was based on probable cause and that the amount of force employed by Morin was reasonable. They also contend that the City may not be held liable for violations of constitutional rights pursuant to a theory of *respondeat superior*, and that the remaining defendants are entitled to qualified immunity.

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was

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period, typically one year.

[5] The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . .

U.S. Const. amend. IV.

committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citations omitted). "*[A]ll* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the [F]ourth [A]mendment and its 'reasonableness' standard, . . . ." *Graham v. Connor*, 490 U.S. 386, 395 (1989) (citations omitted). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." *Graham*, 490 U.S. at 396 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). The proper Fourth Amendment analysis "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

***1. The City and Chief McCamish***

As a preliminary matter, the Court finds that no genuine issue of material fact has been generated as could result in the liability of the City of Augusta or Chief McCamish on Count I. The plaintiff contends that the City and McCamish may be held liable under § 1983 because they were on notice of Officer Morin's aggressive behavior with citizens and failed to take adequate steps to supervise or train him properly. "[T]he doctrine of *respondeat superior* does not apply to claims under § 1983." *Gaudreault v. Municipality of Salem, Mass.*, 923 F.2d 203, 209 (1st Cir. 1991), *cert. den.*, 500 U.S. 956 (1991). A municipal liability claim pursuant to § 1983 "requires proof that the municipality maintained a policy or custom which caused, or was the moving force behind, a deprivation of constitutional rights." *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 544 (1st Cir. 1996) (citing *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978)) (other

citations omitted). Supervisors, like municipalities, "can be held liable only on the basis of their own acts or omissions, amounting at least to 'reckless' or 'callous' indifference to the constitutional rights of others." *Gaudreault*, 923 F.2d at 209 (citation omitted). A § 1983 plaintiff alleging that a municipality is liable for failing to adequately train its police force must satisfy a two-part test. First, the plaintiff must show that the municipality's conduct amounted to a "deliberate indifference to the rights of persons with whom the police come in contact." *Canton v. Harris*, 489 U.S. 378, 388-89 (1989). Thus, Whitney must demonstrate that the need for training Morin with respect to Whitney's right to be free from an unreasonable seizure is "*so obvious*" that the failure to train "could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.* at 390 n.10. Whitney also may show that the City was deliberately indifferent to the need for training because "the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city." *Id.* Second, the "deficiency in training [must have] actually caused the police officer's indifference" to the plaintiff's constitutional rights. *Id.* at 391.

The plaintiff has failed to satisfy the above standard. Whitney has not set forth adequate facts to warrant a conclusion that the City maintained a policy or custom as to render them liable under § 1983. Moreover, nothing in the plaintiff's affidavits, depositions or other pleadings would convince a reasonable fact finder that the knowledge by McCamish of prior complaints against Morin or McCamish's failure to remove Morin, based on his personnel record, from community patrols, was "so unusual or patently improper as to reflect 'deliberate indifference' under the demanding standard of *Canton v. Harris, . . . .*" *Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994) (citations omitted). In sum, there has been "no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by

[the City or McCamish]--express or otherwise--showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Based on the record before it, the Court cannot conclude that the need for more supervision of Morin was so obvious or the likelihood of a violation of constitutional rights so great as to result in a factual question regarding the City's or McCamish's liability. Accordingly, the Court grants the defendants' motion for a summary judgment on Count I of the plaintiff's complaint inasmuch as it relates to the City and McCamish.

***2. Officers Morin and Brann***

The Court concludes that genuine issues of material fact remain for trial concerning Whitney's § 1983 claims against Officers Morin and Brann. The Fourth Amendment right to be free from unreasonable seizures requires that an arrest be supported by probable cause. *See, e.g.*, *Santiago v. Fenton*, 891 F.2d 373, 383 (1st Cir. 1989) (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "A determination of probable cause rests on whether, at the moment the arrest was made, . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense." *Id.* at 384 (internal quotations and citations omitted).

The evidence presented by the plaintiff would permit a jury to find that Morin lacked probable cause to arrest Whitney for allegedly assaulting him. Whitney testified at his deposition that he did not raise his hands or arms against Morin, and maintains in his brief that he did not push or shove Morin. The fact finder may believe Whitney's version of the events that transpired that day, and thus could find that no probable cause for his arrest existed. The Court thus denies the

defendants' motion for a summary judgment on Count I of the plaintiff's complaint as it relates to Morin.

Likewise, pursuant to § 1983, a defendant police officer may be liable for failing to intervene when, in his presence or with his knowledge, an unconstitutional violation such as unreasonable force against an arrestee takes place. *See Brunner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982), *cert. den., Bates v. Brenner*, 459 U.S. 1171 (1983); *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981). As the Seventh Circuit stated in one of the leading cases on this issue:

> [I]t is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish[6] a third person in his presence or otherwise within his knowledge. That responsibility obviously pertains when the nonfeasor is a supervisory officer to whose direction the misfeasor officers are committed. So, too, the same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment, for to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws and preserve the peace.

*Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir. 1972); *see also Clark v. Taylor*, 710 F.2d 4, 9 (1st Cir. 1983) (citing *Byrd*).

Evidence has been presented by the plaintiff that Brann was present at the scene when Morin brought Whitney out of the glass-enclosed walkway, placed him on the hood of the cruiser, handcuffed him, and put him in the cruiser. Because much of the plaintiff's case arises out of these events, and because a reasonable fact finder could find that Brann's failure to intervene amounted

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[6] Although the present case does not involve a claim of summary punishment by Morin, the officer directly involved in Whitney's arrest, this analysis is relevant to all constitutional violations involving claims of excessive force. *See Skevofilax v. Quigley*, 586 F. Supp. 532, 543 (D. N.J. 1984).

to a violation of Whitney's Fourth Amendment rights, *see Byrd*, 466 F.2d at 11, a summary judgment as to Brann's § 1983 liability is inappropriate.

***3. Qualified immunity***

The defendants contend that they are entitled to qualified immunity, which shields government officers "'from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials--like other officials who act in ways they reasonably believe to be lawful--should not be held personally liable.'" *Id.* (quoting *Anderson*, 483 U.S. at 641). The inquiry regarding qualified immunity "takes place prior to trial, on motion for summary judgment . . . and requires no fact finding, only a ruling of law strictly for resolution by the court." *Id.* at 1373-74.

The qualified immunity inquiry has two prongs. First, the Court must determine whether the right asserted by the plaintiff was clearly established at the time of the contested events. *Id.* at 1373. Here there is no dispute that the right to be free from unreasonable seizures of the person was well established long before the date of the underlying incident in this case. *See, e.g., Vitalone v. Curran*, 665 F. Supp. 964, 973-74 (D. Me. 1987). Also, it is readily apparent from pre-existing case law, *see Anderson*, 483 U.S. at 640, that it was unlawful for a police officer to refuse to intervene while another officer used excessive force in arresting a citizen.[7] *See Clark*, 710 F.2d at 9. The Court

[7] The Court is not suggesting that either Officer Morin's or Officer Brann's conduct actually violated the plaintiff's Fourth Amendment rights. That is a question for the fact finder to resolve.

concludes that, having failed to satisfy either prong, the remaining defendants are not entitled to the defense of qualified immunity.

***4. Punitive damages***

The plaintiff seeks punitive damages against the defendants for violations of his civil rights. Although the Court has concluded that Whitney's § 1983 claim may not proceed against the City and Chief McCamish, the Court determines that the federal claim shall proceed to trial as against Officers Morin and Brann. In view of the above conclusions with respect to the plaintiff's Fourth Amendment claim, the Court denies the defendants' motion for a summary judgment with respect to Whitney's claim for punitive damages against Officers Morin and Brann.

The Supreme Court has held that "a jury may be permitted to assess punitive damages in an action under section 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). The Court concludes that in this case it is more appropriately left to the fact finder to assess whether the defendants' conduct, if proven to be violative of the plaintiff's constitutional rights, was motivated by actual malice or reckless indifference sufficient to warrant punitive damages. Accordingly, the defendants' motion for a summary judgment on the plaintiff's punitive damages claims against Morin and Brann is denied. ***B. State claim***

In Count II of his complaint, Whitney alleges that the defendants' conduct gave rise to offensive contact on his person as to constitute assault. Whitney seeks compensatory and punitive damages on this claim. The defendants have raised affirmative defenses based on personal immunity under the Maine Tort Claims Act, 14 M.R.S.A. §§ 8111(1)(B), (E) (Supp. 1996).

***1. Assault***

Although Whitney seeks damages pursuant to a claim of assault, the evidence discloses that his claim could also be based on the tort of battery. An actor is subject to liability to another for assault if: (1) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (2) the other is thereby put in such imminent apprehension. *Restatement (Second) of Torts* § 21 (1964). An actor is subject to liability to another for battery if: (1) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (2) a harmful contact with the person of the other directly or indirectly results. *Restatement (Second) of Torts* § 13.

First, the Court disposes of the plaintiff's claim as it relates to Chief McCamish. McCamish has raised the defense of discretionary immunity in response to Whitney's claim. The plaintiff contends that McCamish is not entitled to immunity because he failed to properly train and discipline the defendants. Because discretionary immunity pursuant to 14 M.R.S.A. § 8111(1)(C) is an affirmative defense, *MacKerron v. Madura,* 445 A.2d 680, 682 (Me. 1982), *appeal after remand,* 474 A.2d 166 (Me. 1984), McCamish bears the burden of proving that he is entitled to such a defense. As the Law Court has made clear, the proper focus for purposes of immunity under the Maine Tort Claims Act is whether a defendant's conduct "exceeded . . . the *scope* of any discretion he could have possessed in his official capacity." *Polley v. Atwell,* 581 A.2d 410, 414 (Me. 1990). As discussed above, McCamish's involvement in the underlying facts of this case is tenuous at best; the facts do not permit him to be held vicariously liable for offensive physical contact with the plaintiff. McCamish is entitled to a summary judgment pursuant to the immunity afforded him under

14 M.R.S.A. § 8111(1)(C). Accordingly, a summary judgment on the plaintiff's tort claim against McCamish is granted in his favor.

Second, regarding the City of Augusta, the defendants correctly state that the Maine Tort Claims Act does not create general vicarious liability for tort claims by virtue of the employee/employer relationship, and, thus, claims against a city based on a theory of *respondeat superior* are seldom successful. The Act specifically provides, however, that the immunities created therein do not apply to the extent that the governmental entity has insurance coverage. 14 M.R.S.A. § 8116 (Supp. 1996); *see also Moore v. City of Lewiston*, 596 A.2d 612, 614-15 (Me. 1991). In *Moore*, the Law Court held that the burden is on the governmental entity to demonstrate that it does not have such coverage. *Id.* The City of Augusta has not met its burden here, however, because no such evidence regarding the existence or extent of its insurance coverage has been presented. A summary judgment for the City on this claim thus is denied except as to the plaintiff's claim for punitive damages. The Court concludes that punitive damages are not available against the City in this action. *See* 14 M.R.S.A. § 8105(5) (1980).

Finally, the Court concludes that the plaintiff's claim against defendants Morin and Brann may proceed to trial. Although Maine case law has construed 14 M.R.S.A. § 8111(1)(C) to apply to claims of excessive force, *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991), there remain genuine issues as to whether the defendants used more force than even they thought was reasonably necessary in this case.

The Court need not consider the defendants' immunity claims under the Act in great detail for, as noted above, the record on summary judgment generates genuine issues of fact as to whether the actions of Morin and Brann, in arresting Whitney, were discretionary acts reasonably

encompassed by their duties. 14 M.R.S.A. § 8111(1)(C). Although the defendants may have been cloaked with discretion to arrest Whitney, that scope does not entitle them to "use[] more force than they reasonably thought to be necessary." *Leach*, 599 A.2d at 426. Summary judgments thus are inappropriate as to Morin and Brann's claims to discretionary immunity. The Court denies the defendants' motion for summary judgments on Count II of the plaintiff's complaint as it relates to Morin and Brann.

Accordingly, the defendants' motion for summary judgments on Count I of the plaintiff's complaint is granted as to the City of Augusta and Wayne McCamish, but is denied as to Al Morin and Keith Brann. Likewise, the defendants' motion for summary judgments on Count II of the plaintiff's complaint is granted as to Wayne McCamish, but is denied as to the City, except as it relates to a claim for punitive damages against the City, and is denied as to Al Morin and Keith Brann.

***SO ORDERED.***

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on February 19, 1997.